CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 309

THE UNITED STATES, PETITIONER

vs.

ROBERT MORSS LOVETT

No. 310

THE UNITED STATES, PETITIONER

vs.

GOODWIN B. WATSON

No. 311

THE UNITED STATES, PETITIONER

vs.

WILLIAM E. DODD, Jr.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONS FOR CERTIORARI FILED FEBRUARY 5, 1946
CERTIORARI GRANTED MARCH 25, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 809

THE UNITED STATES, PETITIONER

vs.

ROBERT MORSS LOVETT

No. 810

THE UNITED STATES, PETITIONER

vs.

GOODWIN B. WATSON

No. 811

THE UNITED STATES, PETITIONER

vs.

WILLIAM E. DODD, JR.

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 46026

ROBERT MORSS LOVETT

vs.

THE UNITED STATES

History of Proceedings

The original petition was filed on December 3, 1943.

On September 27, 1944, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition which is as follows.

Amended Petition—Filed September 27, 1944

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

Plaintiff respectfully represents:

I

1. Plaintiff is a citizen of the United States and a resident of the Virgin Islands.

2. Plaintiff file this petition to recover from the United States an amount equivalent to his salary—base pay, including differential, plus overtime—in the sum of $2090.65, more or less, subject to exact computation, as compensation for the performance
2 of his regular duties as Executive Assistant to the Governor of the Virgin Islands from November 16, 1943, through March 13, 1944.

3. Plaintiff was commissioned the United States Government Secretary of the Virgin Islands on April 28, 1939, having been appointed to that office by the President pursuant to Section 21 of the Organic Act of the Virgin Islands. Act of June 22, 1936 (49 Stat. 1812, 48 U. S. Code, Sec. 1405t). Plaintiff was appointed to the office of Executive Assistant to the Governor of the Virgin Islands on August 26, 1943, by the Secretary of the Interior, pursuant to authority granted in Section 23 of the Act of June 22, 1936 (49 Stat. 1813, 48 U. S. Code, Sec. 1405v). Plaintiff entered on duty as such executive officer on October 12, 1943. The compensation for the position of Executive Assistant to the Governor of the Virgin Islands is fixed at a base rate of $4,600 per annum, plus a 25 per cent differential for service outside of the continental United States, as established by Regulations of the Department of

Interior issued January 20, 1943, pursuant to authority granted in the Act of July 3, 1930 (46 Stat. 1005, 5 U. S. Code, Sec. 678a), plus overtime, computed in accordance with the War Overtime Pay Act of 1943 (57 Stat. 75, 50 U. S. C. A., Appendix, Secs., 1401 and 1402). Plaintiff has faithfully performed all duties, and has faithfully met all responsibilities, imposed upon him as Executive Assistant to the Governor of the Virgin Islands, from October 12, 1943, through March 13, 1944.

4. Plaintiff was, from April 28, 1939, until his resignation on March 13, 1944, a duly appointed and acting officer in the executive branch of the federal government.

3 5. Harold L. Ickes is the duly appointed, qualified and acting Secretary of the Interior of the United States and as such is head of the Department of the Interior, and exercises general supervision and control over the executive branch of the government of the Virgin Islands, as provided by Rev. Stat., Sec. 437 (5 U. S. Code, Sec. 481); Rev. Stat., Sec. 442 (5 U. S. Code, Sec. 486); Rev. Stat., Sec. 441 as amended (5 U. S. Code, Sec. 485); and the Act of June 22, 1936 (49 Stat. 1812, 48 U. S. Code, Sec. 1405s et seq., as amended). As Secretary of the Interior, Mr. Ickes has the power of appointment and removal of various of the officers and employees of the United States in the executive branch of the government of the Virgin Islands, including the appointment of plaintiff to, and removal of plaintiff from, his position as Executive Assistant, pursuant to authority granted in the Act of June 22, 1936 (48 U. S. Code, Sec. 1405v). Said Secretary of the Interior, or someone acting on his behalf, also has the duty of signing all requisitions for the advance or payment of money, out of the Treasury, for expenditures upon business of the Department, including the expenditures for administration of the Virgin Islands, as provided by Rev. Stat., Sec. 444 as amended (5 U. S. Code, Sec. 487), and Act of June 22, 1936 (49 Stat. 1813, 48 U. S. Code, Sec. 1405v).

II

6. On February 9, 1943, The House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution a Special Subcommittee of the Committee on Appropriations conducted hearings from April 9–15, 1943, in secret session to investigate certain charges made against, inter alia, plaintiff.

4 7. The Committee on Appropriations in House Report No. 448 (78th Cong., 1st Sess.), dated May 14, 1943, approved findings of the foregoing Special Subcommittee that plaintiff was "unfit to continue" in federal employment, and

acting further under Resolution 105, amended H. R. 2714 (Urgent Deficiency Appropriation Bill). This amendment, after having been rejected by the Senate (89 Cong. Rec. 5103), was restored with modifications in Conference (H. Rep. 661, 78th Cong., 1st Sess., July 3, 1943) and was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943 (Public Law 132) on July 12, 1943. Section 304 of the Urgent Deficiency Appropriation Act, 1943, thus enacted provides:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

5. 8. By letter of November 23, 1943, Morris F. de Castro, Commissioner of Finance of the Virgin Islands and the officer authorized to certify the payment of salary to plaintiff, advised the Secretary of the Interior that in view of Section 304 of the Urgent Deficiency Appropriation Act, 1943, he would not certify for payment the salary of plaintiff after November 15, 1943.

9. By letter of November 26, 1943, Harold L. Ickes, Secretary of the Interior, wrote plaintiff as follows:

"MY DEAR MR. LOVETT: When you were last in Washington I discussed with you the implications of section 304 of the Urgent Deficiencies Act. During these conferences I urged, despite the prohibition, your staying on the job after November 15, for the reason that the limitations contained in section 304 are, in my opinion and in the opinion of my Solicitor, an unwarranted interference with my executive powers.

"I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of the Urgent Deficiencies Act is declared invalid by the courts.

I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.

"In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.

"Sincerely yours,

"(S) HAROLD L. ICKES.
"*Secretary of the Interior.*"

6 10. On November 29, 1943, the Secretary of the Interior wrote the following letter to plaintiff:

"MY DEAR MR. LOVETT: The Commissioner of Finance of the Virgin Islands has advised me that in view of section 304 of the Urgent Deficiency Bill (Public Law 132, 78th Cong.) funds are not available to pay your salary after November 15, 1943.

"During the past four years you have won the respect and affection of all of the Virgin Islanders, and you have under very trying circumstances, served the Governments of the Virgin Islands and the United States with credit and distinction.

"If there were some appropriate way to avoid the effect of the provision of the Deficiency Act, you would, of course, receive your salary. I should like very much for you to continue in the office of Executive Assistant to the Governor. It would be most difficult for me to find someone to replace you. The matter, however, now is beyond my control. I made every effort to prevent the adoption of the prohibitive provisions of the bill. The action taken by Congress has been very disappointing to me. I hope that you will be successful in challenging the constitutionality of the measure which otherwise prevents the disbursing officers of the Government from paying you the salary for which you are rendering such valuable services.

"With my best wishes, I remain,

"Sincerely yours,

"(S) HAROLD L. ICKES.
"*Secretary of the Interior.*"

This letter plaintiff received in lieu of his pay for the period from November 16, 1943 through November 30, 1943. Plaintiff demanded that he be paid for the services rendered to the
7 United States as Executive Assistant to the Governor of the Virgin Islands from November 15, 1943, through March 13, 1944. This demand was refused.

11. Plaintiff, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, did not receive compensation

for the period from November 16, 1943, through March 13, 1944; nor has plaintiff ever received his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during the period designated. Defendant solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, refused and failed to pay plaintiff compensation for the period from November 16, 1943, through March 13, 1944; nor has defendant ever paid plaintiff his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during the period designated.

Wherefore, plaintiff brings this suit.

III

12. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unlawful and unconstitutional in that it purports to deprive plaintiff of his right to compensation as a duly appointed and continuing executive officer of the United States Government, which right legally exists until such time as he shall have been lawfully relived of, or shall have voluntarily relinquished, that status.

13. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. The attempt by Section 304 to condition plaintiff's right to continued compensation on reappointment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government.

14. Section 304 of the Urgent Deficiency Appropriation Act, 1943, being directed specifically at plaintiff, is a bill of attainder and unconstitutional and void under Section 9 of Article I of the Constitution of the United States.

15. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional and void in that it purports to terminate

plaintiff's status as an executive officer together with his right to compensation therefor and deprives plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution. The proceedings before the Special Subcommittee of the House Committee on Appropriations, upon which the enactment of Section 304 was based, were secret and not public, and were conducted without opportunity for plaintiff to know what charges were to be made against him, to prepare a defense of any kind, to be represented by counsel, to produce witnesses in his behalf, to cross-examine witnesses, to confront his accusers, or to employ the compulsory process of the Committee in his behalf. Section 304 is arbitrary special legislation.

IV

16. Plaintiff avers that it is the unqualified ministerial duty of defendant, acting through Harold L. Ickes, Secretary of the Interior, his agents, assistants or subordinates, including the Commissioner of Finance of the Virgin Islands, to recognize the status of all duly appointed and continuing executive officers within the Department of the Interior and to certify the amounts necessary for expenditures upon the business of that Department, including compensation to the plaintiff for so long as he remained an officer within the Department.

17. Defendant, acting through Morris F. de Castro, Commissioner of Finance of the Virgin Islands, refused and failed to pay the plaintiff the amount of the claim herein sued upon solely because Morris F. de Castro believed that Section 304 compelled him to decline to perform his aforesaid ministerial duties.

18. Plaintiff avers that defendant now wrongfully and illegally withholds his salary for the period from November 16, 1943, through March 13, 1944, in the amount of $2,090.65, more or less, subject to exact computation, no part of which has been paid, and wrongfully and illegally refuses to pay the plaintiff the sum stated.

19. Plaintiff, as sole and absolute owner of the claim herein presented, has made no transfer or assignment of said claim or any part thereof, or any interest therein, and is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets. He has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the United States.

20. Plaintiff, therefore, prays judgment against the United States in the sum of $2,090.65, more or less, subject to exact computation.

ROBERT MORSS LOVETT.
By CHARLES A. HORSKY,
Attorney in Fact.

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.,
Attorneys for Plaintiff.

[*Duly sworn to by Charles A. Horsky; jurat omitted in printing.*]

11 In the Court of Claims of the United States

No. 46027

GOODWIN B. WATSON, PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Petition

(Filed Dec. 3, 1943)

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

Plaintiff respectfully represents:

I

1. Plaintiff is a citizen of the United States and a resident of Washington, District of Columbia.

2. Plaintiff files this petition to recover from the United States an amount equivalent to his salary—base pay, plus overtime—in the sum of $148.50, more or less, subject to exact computation, as compensation for the performance of his regular duties as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1943, through November 21, 1943.

12 3. Plaintiff was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, on November 16, 1941, by the Federal Communications Commission in the exercise of its authority to appoint a director for each division granted by Section 4 of the

Federal Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)). The base pay for the position of Chief of the Analysis Division is $6500 per year, which is below the maximum salary fixed by Section 4 of the Federal Communications Act of 1934 for such position. Overtime compensation is payable in addition thereto, computed in accordance with the War Overtime Pay Act of 1943, May 7, 1943 (57 Stat. 75, 50 U. S. C. A., Appendix, Secs. 1401 and 1402). Plaintiff has faithfully performed all duties and has faithfully met all responsibilities, imposed upon him as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1941, through November 21, 1943.

4. Plaintiff has been at all times since November 16, 1941, and continues to be, a duly appointed officer in the executive branch of the federal government.

5. The Federal Communications Commission has general supervision and control over the independent agency which it heads and which is within the executive branch of the government. It has the power of appointment and removal of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)), including the power of appointment and removal of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Federal Communications Commission. As Secretary of the Commission, T. J. Slowie, or someone acting on his behalf, is authorized to
13 approve before presentation for payment itemized vouchers for all expenditures of the Federal Communications Commission which may be necessary for the execution of its functions, including compensation to plaintiff, and which may be appropriated for by Congress, as provided by the Communications Act of 1934 (48 Stat. 1066, as amended, 47 U. S. Code, Sec. 154 (g)).

II

6. On February 9, 1943, The House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Subcommittee of the Committee on Appropriations conducted hearings from April 9–15, 1943, in secret session, to investigate certain charges made against, inter alia, plaintiff.

7. The Committee on Appropriations in House Report No. 448 (78th Cong., 1st Sess.), dated May 14, 1943, approved findings of the foregoing Special Subcommittee that plaintiff was "unfit to continue" in federal employment, and, acting further under Resolution 105, amended H. R. 2714 (Urgent Deficiency Appro-

priation Bill). This amendment, after having been rejected by the Senate (89 Cong. Rec. 5103), was restored with modifications in Conference (H. Rep. 661, 78th Cong., 1st Sess., July 3, 1943) and was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943 (Public Law 132) on July 12, 1943. Section 304 of the Urgent Deficiency Appropriation Act, 1943, thus enacted provides:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act; or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943,

to pay any part of the salary, or other compensation for the
14 personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence of salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943; Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

8. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as certifying officer for the Commission, wrote the following letter to the plaintiff:

"DEAR MR. WATSON: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6,500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132, 78th Congress, provides as follows:

[Text of Section 304, already set out in paragraph 7 of Petition, is here omitted.]

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.48.

"If you desire to avail yourself of the benefits of the pro-
15 viso which preserves your right to receive compensation for

annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. U. Slowie,
T. U. Slowie,
Secretary."

This letter plaintiff received in lieu of his pay for the period from November 16, 1943, through November 21, 1943. Plaintiff demanded that he be paid for the services rendered to the United States as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused.

9. Plaintiff, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, did not receive compensation for the period from November 16, 1943, through November 21, 1943; nor has plaintiff ever received his pro rata annual base salary, with overtime, or any part thereof, for the services rendered during the period designated. Defendant, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, refused and failed to pay plaintiff compensation for the period from November 16, 1943, through November 21, 1943; nor has defendant ever paid plaintiff his pro rata annual base salary, with overtime, or any part thereof, for the services rendered during the period designated.

Wherefore, the plaintiff brings this suit.

III

10. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unlawful and unconstitutional in that it purports to deprive plaintiff of his right to compensation as a duly appointed and continuing executive officer of the United States Government, which right legally exists until such time as he shall have been lawfully relieved of, or shall have voluntarily reinquished, that status;

11. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. The attempt by Section 304 to condition plaintiff's right to continued compensation on reappoint-

ment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government.

12. Section 304 of the Urgent Deficiency Appropriation Act, 1943, being directed specifically at plaintiff, is a bill of attainder and unconstitutional and void under Section 9 of Article I of the Constitution of the United States.

13. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional and void in that it purports to terminate plaintiff's status as an executive officer together with his right to compensation therefor and deprives the plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution. The proceedings before the Special Subcommittee of the House Committee on Appropriations, upon which the enactment of Section 304 was based, were secret and not public, and were conducted without opportunity for plaintiff to know what charges were to be made against him, to prepare a defense of any kind, to be represented by counsel, to produce witnesses in his behalf, to cross-examine witnesses, to confront his accusers, or to employ the compulsory process of the Committee in his behalf. Section 304 is arbitrary special legislation.

17

IV

14. Plaintiff avers that it is the unqualified ministerial duty of defendant, by its duly authorized agent, T. J. Slowie, Secretary and certifying officer for the Federal Communications Commission, or someone acting on his behalf, to recognize the status of all duly appointed and continuing executive officers within the Federal Communications Commission and to certify and to pay the amounts necessary for expenditures upon the business of that independent agency, including compensation to the plaintiff for so long as he remains an officer within that agency.

15. T. J. Slowie, acting for the defendant as Secretary of the Federal Communications Commission, refused and failed to certify for payment, or to pay, to plaintiff the amount of the claim herein sued upon solely because, despite its unconstitutionality, he believed that Section 304 compelled him to decline to perform his aforesaid ministerial duties unless and until Section 304 has been declared unconstitutional by judicial decision.

16. Plaintiff avers that defendant now wrongfully and illegally withholds his salary for the period from November 16, 1943,

through November 21, 1943, in the amount of $148.50, more or less, subject to exact computation, no part of which has been paid, and wrongfully and illegally refuses to pay the plaintiff the sum stated.

17. Plaintiff, as sole and absolute owner of the claim herein presented, has made no transfer or assignment of said claim or any part thereof, or any interest therein, and is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets. He has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the United States.

18. Plaintiff, therefore, prays judgment against the United States in the sum of $148.50, more or less, subject to exact computation.

GOODWIN B. WATSON, *Plaintiff.*

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.,
Attorneys for Plaintiff.

[*Duly sworn to by Goodwin B. Watson; jurat omitted in printing.*]

19. In the Court of Claims of the United States

No. 46028

WILLIAM E. DODD, JR., PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Petition

(Filed Dec. 3, 1943)

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

Plaintiff respectfully represents:

I

1. Plaintiff is a citizen of the United States and a resident of Arlington, Virginia.

2. Plaintiff files this petition to recover from the United States an amount equivalent to his salary—base pay, plus overtime—in the sum of $79.75, more or less, subject to exact computation, as

compensation for the performance of his regular duties as Assistant News Editor, Federal Communications Commission, from November 16, 1943, through November 21, 1943.

20 3. Plaintiff was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission on December 1, 1941, by the Federal Communications Commission in the exercise of its authority to appoint such employees granted by Section 4 of the Federal Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)). The base salary for the position of Assistant News Editor is $3,200 per year, which base rate, as provided by Section 4 of the Federal Communications Act of 1934, has been fixed by the Civil Service Commission. Overtime compensation is payable in addition thereto, computed in accordance with the War Overtime Pay Act of 1943, May 7, 1943 (57 Stat. 75, 50 U. S. C. A., Appendix, Secs. 1401 and 1402). Plaintiff has faithfully performed all duties, and has faithfully met all responsibilities, imposed upon him as Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, from December 1, 1941, through November 21, 1943.

4. Plaintiff has been at all times since December 1, 1941, and continues to be, a duly appointed officer in the executive branch of the federal government.

5. The Federal Communications Commission has general supervision and control over the independent agency which it heads and which is within the executive branch of the government. It has the power of appointment and removal of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)), including the power of appointment and removal of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Federal Communications Commission. As Secretary of the Commission, T. J. Slowie, or someone acting on his behalf, is

21 authorized to approve before presentation for payment itemized vouchers for all expenditures of the Federal Communications Commission, which may be necessary for the execution of its functions, including compensation to plaintiff, and which may be appropriated for by Congress, as provided by the Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (g)).

II

6. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Subcommittee of the Committee on Appro-

priations conducted hearings from April 9–15, 1943, in secret session, to investigate certain charges made against, inter alia, plaintiff.

7. The Committee on Appropriations in House Report No. 448 (78th Cong., 1st Sess.), dated May 14, 1943, approved findings of the foregoing Special Subcommittee that plaintiff was "unfit to continue" in federal employment, and, acting further under Resolution 105, amended H. R. 2714 (Urgent Deficiency Appropriation Bill). This amendment, after having been rejected by the Senate (89 Cong. Rec. 5103), was restored with modifications in Conference (H. Rep. 661, 78th Cong., 1st Sess., July 3, 1943) and was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943 (Public Law 132) on July 12, 1943. Section 304 of the Urgent Deficiency Appropriation Act, 1943, thus enacted provides:

"SEC. 304. No part of any appropriation, allocation, of fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other com-
22 pensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943; Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

8. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as the certifying officer of the Commission, wrote the following letter to the plaintiff:

"DEAR MR. DODD: The Commission's records shows that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $3,200 per annum, your compensation for this pay period, with overtime, would ordinarily be $159.51. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132; 78th Congress, provides as follows:

[Text of Section 304, already set out in paragraph 7 of Petition, is here omitted.]

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $96.51. Accordingly, after adjustment of tax deduction $5.00, and retirement deduction $4.00, there is enclosed a check for $87.51.

"If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. J. Slowie,
T. J. Slowie,
Secretary."

This letter plaintiff received in lieu of his pay for the period from November 16, 1943, through November 21, 1943. Plaintiff demanded that he be paid for the services rendered to the United States as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused.

9. Plaintiff, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, did not receive compensation for the period from November 16, 1943, through November 21, 1943; nor has plaintiff ever received his pro rata annual base salary, with overtime, or any part thereof, for the services rendered during the period designated. Defendant, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, refused and failed to pay plaintiff compensation for the period from November 16, 1943, through November 21, 1943; nor has defendant ever paid plaintiff his pro rata annual base salary, with overtime; or any part thereof, for the services rendered during the period designated.

Wherefore, the plaintiff brings this suit.

III

10. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unlawful and unconstitutional in that it purports to deprive plaintiff of his right to compensation as a duly appointed and continuing executive officer of the United States Government, which right legally exists until such time as he

shall have been lawfully relieved of, or shall have voluntarily relinquished, that status.

11. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. The attempt by Section 304 to condition plaintiff's right to continued compensation on reappointment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government.

12. Section 304 of the Urgent Deficiency Appropriation Act, 1943, being directed specifically at plaintiff, is a bill of attainder and unconstitutional and void under Section 9 of Article I of the Constitution of the United States.

13. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional and void in that it purports to terminate plaintiff's status as an executive officer together with his right to compensation therefor and deprives the plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution. The proceedings before the Special Subcommittee of the House Committee on Appropriations, upon which the enactment of Section 304 was based, were secret and not public, and were conducted without opportunity for plaintiff to know what charges were to be made against him, to prepare a defense of any kind, to be represented by counsel, to produce witnesses in his behalf, to cross-examine witnesses, to confront his accusers, or to employ the compulsory process of the Committee in his behalf. Section 304 is arbitrary special legislation.

IV

14. Plaintiff avers that it is the unqualified ministerial duty of defendant, acting through its duly authorized agent, T. J. Slowie, Secretary and certifying officer for the Federal Communications Commission, to recognize the status of all duly

pointed and continuing executive officers within the Federal Communications Commission and to certify the amounts necessary for expenditures upon the business of that independent agency, including compensation to the plaintiff for so long as he remains an officer within that agency.

15. T. J. Slowie, acting for the defendant as Secretary of the Federal Communications Commission, refused and failed to certify for payment to plaintiff the amount of the claim herein sued upon solely because, despite its unconstitutionality, T. J. Slowie believed that Section 304 compelled him to decline to perform his aforesaid ministerial duties unless and until Section 304 has been declared unconstitutional by judicial decision.

16. Plaintiff avers that defendant now wrongfully and illegally withholds his salary for the period from November 16, 1943, through November 21, 1943 in the amount of $79.75, more or less, subject to exact computation, no part of which has been paid, and wrongfully and illegally refuses to pay the plaintiff the sum stated:

26 17. Plaintiff, as sole and absolute owner of the claim herein presented, has made no transfer or assignment of said claim or any part thereof, or any interest therein, and is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets. He has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the United States.

18. Plaintiff, therefore, prays judgment against the United States in the sum of $79.75, more or less, subject to exact computation.

WILLIAM E. DODD, JR.,
Plaintiff.

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.
Attorneys for Plaintiff.

[*Duly sworn to by William E. Dodd, Jr.; jurat omitted in printing.*]

27 *General traverse.*

Filed Nov. 6, 1944

On November 6, 1944, a general traverse was filed to the amended petition in case No. 46026 which is as follows:

And now comes the Attorney-General, on behalf of the United States, and answering the amended petition of the claimant herein,

denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

DBM.
EEE.

General traverses

Filed Feb. 7, 1944

On February 7, 1944, general traverses were filed in cases Nos. 46027 and 46028 which are as follows:

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained: and asks judgment that the petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

EEE.

Argument and submission of case

On June 6, 1945, the cases were argued and submitted together on merits by Mr. Charles A. Horsky for plaintiffs, by Mr. Rawlings Ragland for the Attorney General, and by Mr. John C. Gall for the Congress of the United States.

29 *Special findings of fact, conclusions of law and opinion of the court by Whaley, Ch. J., concurring opinions by Whitaker, J., Jones J., and Madden J.*

Filed November 5, 1945

Mr. Charles A. Horsky for the plaintiffs. Mr. Edward B. Burling, Miss Amy Ruth Mahin, and Covington, Burling, Rublee, Acheson & Shorb, were on the briefs.

Mr. Rawlings Ragland, with whom was Mr. Assistant Attorney General Francis M. Shea, for the Attorney General. Messrs. Donald B. MacGuineas and Henry Weihofen were on the brief.

Mr. John C. Gall for the Congress of the United States. Messrs. Dean Hill Stanley, William F. Howe, Karl M. Dollak, Jos. G. Butts, Jr., John E. Ritzert, and Clark M. Robertson were on the briefs.

This case having been heard by the Court of Claims, the court, upon the stipulation entered into between the parties, makes the following

Special findings of fact

No. 46026. Robert Morss Lovett v. The United States.

1. Plaintiff, Robert Morss Lovett, is a citizen of the United States and at the time of the filing of this suit was a resident of the Virgin Islands.

2. Plaintiff was commissioned the United States Government Secretary of the Virgin Islands on April 28, 1939, having been appointed by the President pursuant to Section 21 of the Organic Act of the Virgin Islands (Act of June 22, 1936). Plaintiff took the oath of office on July 17, 1939. On August 26, 1943, plaintiff was appointed Executive Assistant to the Governor of the Virgin Islands by the Secretary of Interior, pursuant to authority granted in Section 23 of the Organic Act of the Virgin Islands (Act of June 22, 1936) to succeed Mr. W. M. Freeman, who had resigned. Plaintiff entered on duty as such Executive Assistant on October 12, 1943.

3. The compensation for the position of Executive Assistant to the Governor of the Virgin Islands is fixed at a base rate of $4,600 per annum plus a 25 percent differential for services outside of the Continental United States, plus overtime computed in accordance with the War Overtime Pay Act of 1943. Plaintiff has performed the duties incident to the position of Executive Assistant to the Governor of the Virgin Islands from October 12, 1943, through March 13, 1944. On March 6, 1944, Harold L. Ickes, Secretary of the Interior wrote plaintiff as follows:

"My Dear Mr. Lovett: Last November, I authorized you to continue your services to the Government after November 15, in spite of the provision of section 304 of the Urgent Deficiency Act (Public Law 132, 78th Cong.), which prohibited the use of appropriated funds for the payment of your salary. The principal purpose of that authorization was to make it possible for you to test by legal action the validity of section 304. You have continued to serve the Government without receiving your salary since November 15, 1943.

"As you no doubt know, this Department has been bitterly criticized by the Congress in recent months for continuing to accept them after you had worked for a period which would permit you to test the constitutionality of Congressional action. In these circumstances I have concluded that I have no alternative but to request your resignation.

"The matter is now before the Court of Claims, and I believe that the position taken by this Department and by yourself will be vindicated, in which case you will receive all the salary which you have earned. I want again to acknowledge the respect and affection

in which you are held by the people of the Virgin Islands and to assure you of my own highest regards and esteem.

"With best wishes to you and Mrs. Lovett, I am

"Sincerely yours,

"(S) HAROLD L. ICKES,
"Secretary of the Interior."

31 On March 13, 1944, plaintiff wrote Harold L. Ickes, Secretary of the Interior, as follows:

"MY DEAR MR. ICKES: In accordance with your request, I am sending you my resignation as Executive Assistant to the Governor of the Virgin Islands, effective at the close of March 30, 1944. I do so with regret because of my pleasant relations during the past five years with the peoples of the Virgin Islands. I thank you for the opportunity of living among them and serving them in conjunction with my colleagues of all departments whose friendship and cooperation will always be a happy memory. For your own encouragement and support, and that of the Department, I shall always be profoundly grateful. It is obvious that the Department should not bear any longer the burden of the personal hostility toward me of members of Congress, and that I can best serve the people of the Virgin Islands by leaving them.

"Sincerely yours,

"(S) ROBERT M. LOVETT."

4. Harold L. Ickes is the duly appointed qualified and acting Secretary of the Interior of the United States. As such he is head of the Department of the Interior and exercises general supervision and control over the Executive Branch of the Government of the Virgin Islands. As Secretary of the Interior, he has the power of appointment of various of the executive and administrative officers and employees of the United States in the Executive Branch of the Government of the Virgin Islands, including the appointment of plaintiff to his position as Executive Assistant, pursuant to authority granted in the Organic Act of the Virgin Islands (Act of June 22, 1936). As Secretary of the Interior, he or someone acting on his behalf, has the duty of signing all requisitions for the advance or payment of money out of the Treasury for expenditures of business of the Department, including expenditures for the administration of the Virgin Islands.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These rules were first published in the Congressional Record of June 2, 1943 (Congressional

Record, 78th Congress, 1st Session, Appendix, p. 7062). The
32 Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made, *inter alia*, against plaintiff. The hearings before the Sub-Committee were held in executive session. Plaintiff was invited by letter handed him on April 14 to appear in person before the Sub-Committee on April 15 and make such statements or explanations under oath as he might desire, and to answer such questions as might be propounded. The invitation advised plaintiff that if he was unacquainted with the charges and allegations concerning him a copy would be furnished upon request. No such request was made by plaintiff. Plaintiff was shown at the hearing 54 charges made against him by the Committee on Un-American Activities of the House of Representatives, 78th Congress, 1st Session, acting pursuant to H. R. 282. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiff's case, were and are confidential, except that the charges formulated by the Committee on Un-American Activities were shown to plaintiff at the hearing as above stated. The Solicitor of the Department of Interior, on the day before the hearing on April 15, 1943, requested permission to appear at the hearing before the Sub-Committee with plaintiff. He was advised by the Committee that his request to appear as an observer for the Department of the Interior would be considered. On the following day, the Solicitor was informed that the policy of the Sub-Committee, already formulated in prior hearings involving persons connected with the Federal Communications Commission, was to hold its hearings without any persons other than the Sub-Committee, its staff, and the witness being present. The plaintiff was not proffered, nor did he request, the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff.

33 No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject-matter of the investigation. At the close of the hearing, plaintiff was also accorded an opportunity to make any statements he wished, but registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On May 14, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On May 14, 1943, the Committee on Appropriations submitted a report (H. Rep. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714). Section 304 of the Urgent Deficiency Appropriation Act of 1943 of July 12, 1943, as finally enacted (Public 132), provides as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation, for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursements, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

The President did not appoint plaintiff under Section 304.

7. By letter of November 23, 1943, Morris F. de Castro, Commissioner of Finance of the Virgin Islands and the officer authorized to certify the payment of salary to plaintiff, advised the Secretary of the Interior that in view of Section 304 of the Urgent Deficiency Appropriation Act of 1943, he would not certify for payment the salary of plaintiff after November 15, 1943.

8. By letter of November 26, 1943, Harold L. Ickes, Secretary of the Interior, wrote plaintiff as follows:

"MY DEAR MR. LOVETT: When you were last in Washington I discussed with you the implications of section 304 of the Urgent Deficiencies Act. During these conferences I urged, despite the prohibition, your staying on the job after November 15, for the reason that the limitations contained in section 304 are, in my opinion and in the opinion of my Solicitor, an unwarranted interference with my executive powers.

"I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of

the Urgent Deficiencies Act is declared invalid by the courts. I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.

"In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.

"Sincerely yours,

"(S) HAROLD L. ICKES,
"*Secretary of the Interior.*"

9. On November 29, 1943, the Secretary of the Interior wrote the following letter to plaintiff:

"My Dear Mr. Lovett: The Commissioner of Finance of the Virgin Islands has advised me that, in view of section 304 of the Urgent Deficiency Bill (Public Law 132, 78th Cong.), funds are not available to pay your salary after November 15, 1943.

"During the past four years you have won the respect and affection of all of the Virgin Islanders, and you have, under very trying circumstances, served the Governments of the Virgin Islands and the United States with credit and distinction.

"If there were some appropriate way to avoid the effect of the provision of the Deficiency Act, you would, of course, receive your salary. I should like very much for you to continue in the office of Executive Assistant to the Governor. It would be most difficult for me to find someone to replace you. The matter, however, now is beyond my control. I made every effort to prevent the adoption of the prohibitive provisions of the bill. The action taken by Congress has been very disappointing to me. I hope that you will be successful in challenging the constitutionality of the measure which otherwise prevents the disbursing officers of the Government from paying you the salary for which you are rendering such valuable services.

"With my best wishes, I remain,

"Sincerely yours,

"(S) HAROLD L. ICKES,
"*Secretary of the Interior.*"

Plaintiff demanded that he be paid for the services rendered to the United States as Executive Assistant to the Governor of the Virgin Islands from November 15, 1943, through March 13, 1944. This demand was refused.

10. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 15, 1943, through March 13, 1944, nor has plaintiff ever

received his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during that period. The defendant, acting through Harold L. Ickes, Secretary of the Interior, his agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriations Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay to plaintiff any compensation for the period from November 15, 1943, through March 13, 1944, nor has the defendant ever paid plaintiff his pro rata base salary, plus differential and overtime, or any part thereof, for the services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $1,596.40.

No. 46827. Goodwin B. Watson v. The United States.

1. Plaintiff, Goodwin B. Watson, is a citizen of the United States and at the time of the filing of this suit was a resident of Washington, District of Columbia.

2. Plaintiff was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, on November 16, 1941, by the Federal Communications Commission in the exercise of its authority granted by Section 4 of the Federal Communications Act of 1934. Plaintiff took the oath of office on November 16, 1941.

3. Since October 20, 1942, the compensation for the position of Chief of the Analysis Division has been fixed at a base rate of $6,500 per year, plus, since May 1, 1943, overtime computed in accordance with the War Overtime Pay Act of 1943. Plaintiff has performed the duties incident to the position of Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1941, through November 21, 1943. On May 2, 1944, plaintiff wrote to Dr. Robert D. Leigh, Director of the Foreign Broadcast Intelligence Service, Federal Communications Commission, as follows:

"DEAR MR. LEIGH: As I understand it, the reduction in appropriation for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division and the absorption of some of its work by other groups and other agencies. That seems to me to mark the termination of the work which I came to Washington to do and is hence an occasion on which I submit my resignation.

"In this last official document, I want to express to you, to the other administrative officers, and to the Commissioners and Chairman of the Federal Communications Commission my warm appreciation for the intelligent and courageous support which

they give to the war effort, to the FBI, to our Navy, and to me personally. I am glad to have had a little part in what I believe was a helpful war service, but I shall treasure as the most valuable part of my Washington experience the friends I have made here and the opportunity to work along with my fellow officials in the Federal Communications Commission.

"Cordially yours,

"(S) Goodwin Watson
Goodwin Watson"

On May 3, 1944, Mr. Lovett replied as follows:

"My dear Goodwin: I have your letter of May 2nd [sic] tendering your resignation as Chief of the Analysis Division of the Foreign Broadcast Intelligence Service.

"It is true that the position which you left and which was kept vacant for you has been eliminated so that there is no practical reason for continuance of you on the pay rolls of the FCC. Your resignation coming in this way makes it very clear cut that the act is voluntary.

"From the point of view of good governmental operation and the prosecution of the war effort, I would like to refuse your resignation with double black ridges—the first that would report for the detriment to the project's work by your enforced leave of absence due to the act of Congress. The second would report against the hindrance to the war effort by the reduction in the FBIS appropriation.

"Sincerely yours,

"(S) Robert D. Lovett"

On May 24, 1944, plaintiff received a notification from the Director of Personnel of the Federal Communications Commission that his resignation had become effective on May 21, 1944.

4. The Federal Communications Commission has general supervision and control over the agency which it holds. It has the power of appointment of various of the officers and employees necessary in the execution of its functions, provided in the Communications Act of 1934, including the power of appointment of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Commission and as such T. J. Slowie or someone acting on his behalf, is authorized to approve before presentation for payment itemized vouchers for all expenditures of the Commission which may be necessary for the execution of its functions, including compensation to plaintiff, as provided by the Communications Act of 1934.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this

Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These Rules were first published in the Congressional Record of June 2, 1943 (Congressional Record, 78th Congress, 1st Session, Appendix, p. 2962). The Sub-Committee conducted hearings from April 8 to April 15, 1943, to investigate certain charges made *inter alia*, against plaintiff. The hearings before the Sub-Committee were held in executive session.

38 Plaintiff was invited to appear by letter dated April 7, 1943, as follows:

"DEAR DOCTOR WATSON: In accordance with H. Res. 105, 78th Congress, 1st Session, a copy of which is enclosed, the special subcommittee appointed thereunder has before it files from the Committee on Un-American Activities, the United States Civil Service Commission, the Federal Bureau of Investigation, and the Federal Communications Commission relative to your qualifications and suitability as a federal employee.

"The committee will examine these files beginning Friday, April 9, 1943, at 10 a. m. and you are instructed to appear at room 448 Old House Office Building at such time when opportunity will be afforded you to answer these charges and interrogations by the committee.

"A statement and list of the charges preferred against you before this committee by the Committee on Un-American Activities, House of Representatives, is immediately available for your inspection at the office of this committee.

"Very truly yours,

"(S) JOHN H. KERR.
Chairman, Special Subcommittee."

Plaintiff's reply, addressed to the Chairman of the Sub-Committee, and dated April 8, 1943, was as follows:

"GENTLEMEN: Thank you for your invitation to appear and make a statement before the Kerr Committee. I have the highest respect for this committee and welcome an opportunity for a thorough and judicial review of my case.

"I have prepared the accompanying statement of what seem to me the most relevant facts. With your permission, I should like to present this statement to the committee, and I shall then be glad to answer any questions.

"Yours respectfully,

"(S) GOODWIN WATSON.
Chief, Analysis Division."

The letter of April 7, 1943, advised plaintiff that if he was unacquainted with the charges and allegations concerning him, a copy would be furnished upon request. No such request was made by plaintiff. Plaintiff was shown at the hearing 29 charges made against him by the Committee on Un-American Activities of the House of Representatives, 78th Congress 1st Session, acting
39 pursuant to H. R. 282. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others which were considered by the Sub-Committee in connection with plaintiff's case were and are confidential, except that the charges formulated by the Committee on Un-American Activities were shown to plaintiff at the hearing. The general counsel of the Federal Communications Commission appeared at the first session of the Sub-Committee with the first person summoned before it and requested permission to appear as an observer for the Federal Communications Commission, but was advised by the Sub-Committee that it had decided to hold its hearings without any persons other than the Sub-Committee, its staff, and the witness being present. The general counsel thereupon withdrew. Plaintiff was not proffered nor did he request the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches, and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. Plaintiff registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On April 21, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On April 26, 1943, the Federal Communications Commission, having considered the report of the Special Sub-Committee, concluded that it would retain plaintiff in its employment and issued a report thereon. On May 14, 1943, the Committee on Appropriations submitted a report (H. R. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714). Section 304 of the
40 Urgent Deficiency Appropriation Act of 1943 of July 12, 1943, as finally enacted (Public 132), provides as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

The President did not appoint plaintiff under Section 304.

7. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as certifying officer for the Commission, wrote the following letter to the plaintiff:

"DEAR MR. WATSON: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6,500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132, 78th Congress, provides as follows:

* * * * * *

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943 and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.48.

41 "If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. J. Slowie,
T. J. SLOWIE, *Secretary.*"

Plaintiff demanded that he be paid for the services rendered to the United States as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused. Plaintiff was given no instructions by the Commission to cease working on November 15, 1943. The Commission permitted plaintiff to remain at his desk as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 15, 1943, to November 21, 1943.

8. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 16, 1943, through November 21, 1943, nor has plaintiff ever received his pro rata annual base salary plus overtime, or any part thereof, for the services rendered during that period. The defendant, acting through the Federal Communications Commission, its agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay plaintiff any compensation for the period from November 16, 1943, through November 21, 1943, nor has the defendant ever paid plaintiff his pro rata base salary plus overtime, or any part thereof, for services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $101.78.

No. 46628. William E. Dodd, Jr. v. The United States.

1. Plaintiff, William E. Dodd, Jr., is a citizen of the United States and at the time of the filing of this suit was a resident of Arlington, Virginia.

42 2. Plaintiff was appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission, on December 1, 1941, by the Federal Communications Commission in the exercise of its authority to appoint such employees granted by Section 4 of the Federal Communications Act of 1934. Plaintiff took the oath of office on December 1, 1941. On December 22, 1942, plaintiff was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, by the Commission pursuant to said authority.

3. Plaintiff has performed the duties incident to the respective positions of Editorial Assistant and Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, from December 1, 1941, through November 21, 1943.

The compensation for the position of Assistant News Editor is fixed at a base rate of $3,200 per year, plus overtime computed in accordance with the War Overtime Pay Act of 1943. Since November 21, 1943, plaintiff has been on a leave-without-pay status at the Federal Communications Commission, and is in that status at the present time.

4. The Federal Communications Commission has general supervision and control over the independent agency which it heads. It has the power of appointment of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934, including the power of appointment of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Commission and as such T. J. Slowie, or someone acting on his behalf, is authorized to approve before presentation for payment itemized vouchers for all expenditures of the Commission which may be necessary for the execution of its functions, including compensation to plaintiff, as provided by the Communications Act of 1934.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These Rules were first published in the Congressional Record of June 2, 1943
43 — (Congressional Record, 78th Congress, 1st Session, Appendix, p. 2962). The Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made, inter alia, against plaintiff. Plaintiff was invited by letter to appear in person before the Sub-Committee and make such statements or explanations under oath as he might desire, and to answer such questions as might be propounded. The plaintiff requested the Clerk of the Sub-Committee to exhibit to him any charges against him, and was advised by the Clerk that the Sub-Committee had formulated no charges. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiff's case, were and are confidential, except for the testimony of plaintiff before said Committee. The general counsel of the Federal Communications Commission appeared at the first session of the Sub-Committee with the first person summoned before it and requested permission to appear as an observer for the Federal Communications Commission, but was advised by the Sub-Committee that it had decided to hold its hearings without any persons other than the

Sub-Committee, its staff and the witness being present. The general counsel thereupon withdrew. Plaintiff was not proffered nor did he request the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. At the close of the hearing, plaintiff was also accorded an opportunity to make any statements he wished, but registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

44 6. On April 21, 1943, the Special Sub Committee of the Committee on Appropriations reported to the Committee on Appropriations. On April 26, 1943, the Federal Communications Commission, having considered the report of the Special Sub-Committee, concluded that it would retain plaintiff in its employment and issued a report thereon. On May 14, 1943, the Committee on Appropriations submitted a report (H. Rep. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee, and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714).

Section 304 of the Urgent Deficiency Appropriation Act of 1943, of July 12, 1943, as finally enacted (Public 132), provides as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of

the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

The President did not appoint plaintiff under Section 304.

7. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as the certifying officer of the Commission, wrote the following letter to the plaintiff:

"DEAR MR. DODD: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $3,200 per annum, your compensation for this pay period, with overtime, would ordinarily be $159.51. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132, 78th Congress, provides as follows:

* * * * * *

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $96.51. Accordingly, after adjustment of tax deduction $5.00 and retirement deduction $4.00, there is enclosed a check for $87.51.

"If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. J. SLOWIE, *Secretary.*"

Plaintiff demanded that he be paid for the services rendered to the United States as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused. Plaintiff was given no instructions by the Commission to cease working on November 15, 1943. The Commission permitted plaintiff to remain at his desk as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 15, 1943, to November 21, 1943.

8. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him hereunder, has not received compensation from November 16, 1943, through November 21, 1943, nor has plaintiff ever received his pro rata annual base salary plus overtime, or any part thereof, for the services rendered during that period. The defendant, acting through the Federal Communications Com-

mission, its agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay plaintiff any compensation for the period from November 16, 1943,
46 through November 21, 1943, nor has the defendant ever paid plaintiff his pro rata base salary plus overtime, or any part thereof, for services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $59.83.

Conclusions of law

Upon the foregoing special findings of fact, which are made a part of the judgments herein, the court concludes, as a matter of law, that the plaintiffs are entitled to recover.

It is therefore ordered and adjudged that plaintiff Robert Morss Lovett (in case No. 46026) recover of and from the United States the sum of one thousand nine hundred ninety-six dollars and forty cents ($1,996.40); that plaintiff Goodwin B. Watson (in case No. 46027) recover of and from the United States the sum of one hundred one dollars and seventy-eight cents ($101.78); and that plaintiff William E. Dodd, Jr. (in case No. 46028) recover of and from the United States the sum of fifty-nine dollars and eighty-three cents ($59.83).

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

On August 26, 1943, plaintiff Robert Morss Lovett was appointed Executive Assistant to the Governor of the Virgin Islands by the Secretary of the Interior, pursuant to authority granted in Section 23 of the Organic Act of the Virgin Islands of the United States, approved June 22, 1936, 49 Stat. 1807, 1813. He took the oath of office and entered upon the duties thereof October 12, 1943. He performed them thereafter through March 13, 1944, at which time his services ended. He has not been paid the salary of his office for the period November 15, 1943, through March 13, 1944, which amounts to $1,996.40, and this sum he sues to recover.

Plaintiff Goodwin B. Watson was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, November 16, 1941, by the Federal Communications Commission, and took the oath
47 of office and entered upon the duties thereof on that date.

and performed them thereafter through November 21, 1943, when his active services ended. His appointment was made under Section 4 of the Communications Act of 1934, approved June 19, 1934, 48 Stat. 1064, 1066. He sues to recover the salary of his office from November 16, 1943, through November 21, 1943, amounting to $101.78, which he has not been paid.

Plaintiff William E. Dodd, Jr., was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, December 22, 1942, by the Federal Communications Commission, under Section 4 of the Communications Act of 1934, immediately entering upon the duties of that office. He performed those duties thereafter through November 21, 1943. He has not been paid the salary attached to that office for the period from November 16, 1943, through November 21, 1943, which amounts to $59.83, and he sues herein for that amount.

None of the appointments here involved were made by the President of the United States and confirmed by the Senate.

The three cases have been submitted on stipulations, and they have been briefed and argued together. The general question raised has been the constitutionality of Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450.

The plaintiffs assert that the section is unconstitutional, setting forth their reasons for that assertion. The Attorney General having heretofore also taken the position that the section was unconstitutional, and still adhering to that position, the Assistant Attorney General, appearing for the defendant, supports the plaintiffs. Special counsel appear in the cases as *amici curiæ*, having been employed to defend the constitutionality of the disputed section. The special counsel are designated variously in the record as representing the House, the Congress, the United States. Their brief is entitled "Brief for the Congress of the United States," and they sign as "Special Counsel for the Congress of the United States." They will hereinafter be referred to as "special counsel."

Insofar as the law involved in these three cases is concerned, they are not to be distinguished one from the other.

48 Special counsel raise the question of jurisdiction. Section 145 of the Judicial Code governs. The general jurisdiction of this Court in pay cases is too well-known and established to justify re-examination. Section 304, which will be quoted verbatim, in no way indicates that this Court is without jurisdiction. There is not a line or word to that effect. Inferences will not be employed to go to the extent of holding that Congress went so far as to deny these plaintiffs their day in court. The jurisdictional statute is general, and Section 304 contains no exception.

Section 304 is as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson; William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

If Section 304 is unconstitutional and of no effect, recovery follows. Special counsel argue that it is not severable. Their argument is not convincing. We are in no doubt about our jurisdiction.

If, on the other hand, Section 304 is a valid exercise of constitutional power, but notwithstanding that plaintiffs are entitled to recover, then it becomes a matter of indifference whether the section is valid or invalid as an exercise of constitutional power.

The Court will not reach out gratuitously to avail itself of questionable but inapplicable elements in an act and thereby hold it to be unconstitutional. There is always the presumption of validity. The Court will not undertake to say that, because provisions in Section 304, not here operative, are invalid, the whole of the section falls for invalidity.

Much of the argument presented seems to be based on a supposed lack of appropriation. But there was an appropriation. Section 304 refers to an actual appropriation, an "available" appropriation. If "available," the appropriation, as far as these cases are concerned, was available for the payment of these salaries. Availability of the appropriation for other purposes is beside the question. The disbursing agency could divert no part of an appropriation to purposes other than those for which that appropriation was made. Section 304 does not say "otherwise" available, and important words may not be put into the statute that Congress did not place there. There was an appropriation, it was available for the payment of these salaries. If it was not available for the payment of these salaries, then it was clearly not "available" to the administrative bureau. Congress did not

limit the appropriation. What it did limit and what it was directed to was the activities of the disbursing agency. There and there only, did Congress apply the brakes.

Section 304 is notable for what it did not do, as well as for what it did do.

It did not terminate plaintiffs' services. Special counsel insist that it did not work removal from office, and so stated on argument of the cases.

Removal from office is not made an item of damages here. The claim made is only for salary of the office during the time of service, and no longer. We are therefore not concerned with the cause of termination, or in what situation, except for lack of pay, the plaintiffs found themselves thereafter.

This limitation upon the claims made explains why it has not been necessary in reviewing the facts, to gather in many things that are of record, or of which judicial notice may be taken. Many of the circumstances are interesting only, and in no sense material to disposition of the cases.

There is nothing in Section 304 which disturbed plaintiffs' incumbency in office. Special counsel in their brief say

50 "All that the statute did was to say to the disbursing officers of the Government: After November 15, 1943, you shall not pay out any money to Watson, Dodd and Lovett unless prior to that date they have been appointed by the President and confirmed by the Senate. This was merely a direction to disbursing officers, and in itself created no legal rights in anyone."

We repeat, the Court, in passing upon the constitutional validity of a statute will not gratuitously reach out to make use of that which is irrelevant to the case in hand. It was said in Watson v. Buck, 313 U. S. 387, 402:

"A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured."

Section 304 does comprehend more than a direction not to pay for the isolated services here rendered. But that "more" is here irrelevant. In terms the section extends to all available appropriations, all disbursing officers, all departments, agencies or instrumentalities of the United States, all personal services of the instant plaintiffs, and is without limitation in time. But in the cases before us we have for consideration only one specified person

of employment; and, the conditions of that specific employment. We cannot introduce situations which are not before us, and which may indeed never come into being. It may be repeated that here we have no claim for damages for removal from office, no petition for compulsory process, solely a claim for the accrued unpaid salary of an office, the duties of which have been performed by the undisputed holder of that office. These are not suits for reinstatement to office. As was said in California v. Southern Pacific Railroad, 149 U. S. 308, 314:

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. Which, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

The incumbent of the office held it de jure. There was no irregularity in the appointment. There was no removal of the officer from the office, no removal of the salary from the office. The appropriation was made and designated as "available." The only appropriation here, in praesenti, is the appropriation available to pay these salaries.

The closer the statute is examined, the more clearly does it appear that with reference to the particular situation we have here, Congress confined itself to one thing—prohibiting the disbursing agencies from paying the salaries of the plaintiffs. The Act is very carefully framed to avoid denying pecuniary obligations. It is a bare caveat issued against the disbursing agency. As special counsel contend, Congress did not remove from office. The original appointment was unaffected, the office was undisturbed, the compensation was unchanged, the incumbents were not separated from office. They held de jure.

Quoting again from the brief of special counsel:

"Section 304 did not deprive plaintiffs of any right to salary. Section 304 denied to the Federal Communications Commission and to the Secretary of the Interior the funds with which to pay plaintiffs; and since under 47 U. S. C., Sec. 154 grand 48 U. S. C., Sec. 1405 v, the power of those agencies to grant plaintiffs a right to salary depended upon the existence of such funds, Section 304 prevented these agencies from granting the right plaintiffs assert."

We are not free to conclude that Section 304 accomplished deviously that which for certainty's sake should have been accomplished directly, if it could be accomplished at all. What it did do directly, not indirectly, constitutionally or unconstitutionally, and nothing more, was to stay the hand of the disbursing agency.

There would have been no occasion for Section 304 to stop payment if the plaintiffs were not holding their respective offices in fact and in law. No disbursing agent had authority to make payment of salaries to men out of office or not entitled to office, and a direction to such an agent not to pay the salary to a legally displaced officeholder would have been something less than an empty gesture. The obvious circumstance that the section was dealing with was one where the plaintiffs were legally and actually in office. Section 304 did not remove them.

It is to no very useful purpose to inquire into the reason for enactment of Section 304. But, it may be remarked in passing, that it is impossible to conclude that Congress meant that in the final outcome, service was to be free to the Government, because the plaintiffs were, in its opinion let us say, unfit for office. It is plain that the plaintiffs, if unfit, were just as unfit serving the Government for nothing, as serving it for something. There is no logic to the proposition that the plaintiffs were to serve the Government for nothing. The proposition is irrational. Unfitness could not be converted into fitness by withholding salary. Yet the statute allowed these plaintiffs to continue in office.

Section 304 is not to be construed beyond its express, explicit terms, nor beyond its incidence in time. It effectually halted the disbursing process in a special situation, at a particular time. We are not here concerned with other situations, other times. The situation, the occasion, has now passed into history. The accomplished event is not now before the Congress and never has been. But it is here and now before this Court.

It is urged that plaintiffs must fail, because the procedure was not followed of having an appointment "by the President, by and with the advice and consent of the Senate," as provided for in Section 304. It has been observed that Section 304 is notable for what it does not say. It does not say that the services of the plaintiffs are terminated, that they shall not continue on under their current appointments. In other words, as special counsel observe, the section did not remove them from office. The
53 plaintiffs did not have to have a presidential appointment in order to continue in office. They did continue in office. It is only the period of their continuance in office, after November 15, 1943, that is involved in this controversy.

In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due. King v. United States, 1 C. Cls. 38; Graham v. United States, 1 C. Cls. 380; Curtis v. United States, 2 C. Cls. 141; Grant v. United States, 5 C. Cls. 71; Collins v. United States, 15 C. Cls. 22; Briggs v. United States, 15 C. Cls. 48; Parsons v. United States, 15 C. Cls. 246; Hufham v. United States, 17 C. Cls. 55; Dougherty v. United States, 18 C. Cls. 496; Ferris v. United States, 27 C. Cls. 542; Sherlock v. United States, 43 C. Cls. 161; Strong v. United States, 60 C. Cls. 627; Danford v. United States, 62 C. Cls. 285; McNeil v. United States, 64 C. Cls. 406; Cogswell v. United States, 68 C. Cls. 691; Palmer v. United States, 69 C. Cls. 260; Crist v. United States, 74 C. Cls. 283; Conrad v. United States, 74 C. Cls. 289; Wilson v. United States, 77 C. Cls. 630; Leonard v. United States, 80 C. Cls. 147; Miller v. United States, 86 C. Cls. 609; United States v. Langston, 118 U. S. 389; United States v. Vulte, 233 U. S. 509.

The provision in Section 304 that no available appropriation shall be used to pay the salaries of these plaintiffs, here in question, does not reach to this Court. Speaking with reference to the constitutional provision that no money shall be drawn from the Treasury but in consequence of appropriations made by law, this Court said (Collins v. United States, supra):

"That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted with the safe-keeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the Treasury under any circumstances.

"This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress, or the regulations of the executive departments."

54 Section 304 made no pretense to determine a legal liability. It assumed no judicial function. It simply prevented a particular disbursement from a particular fund, no more than that if it be taken for just what it says, without inferences. We are confining ourselves, of course, to the precise claims asserted.

In United States v. Dickerson, 310 U. S. 554, it was held that an appropriation act could suspend the operation of a prior statute granting certain reenlistment allowances. Granted that an appropriation act may be something more than an accounting process, in the case we have here Section 304 makes no attempt to

change or do away with compensation attached to the offices held by the plaintiffs. It merely stopped payment in three specific instances (no other instances are here involved), regardless of obligation.

The obligation was undisturbed. The Act did not say it was destroyed, or even subtly attempt to destroy it, unless we are to indulge in inferences, which we are not disposed to do. It did not say to the plaintiffs: "You are discharged." The status of the plaintiffs was untouched.

The cases cited indicate survival of the obligation in spite of lapse, exhaustion, failure of appropriation. Other reported cases, not pay cases, are crowded with instances of unliquidated damages recovered, recovery against the United States being had in the absence of any appropriation, at all to pay unliquidated damages and in the absence of any authority in the disbursing agency to satisfy the litigant's claim.

In the three cases now here considered there was more than in the cases cited. There were in existence "available" appropriations. As heretofore indicated, full value must be given to the express word "available." It can not be changed to "unavailable." If the appropriations could not be used for these offices, then they were unavailable. The statute says they are available, and they must be so considered.

We have pointed out that Section 304 was without time limitation. Congress can not bind itself to discontinue legislation, if it is to go on as a constitutional body. It may therefore repeal Section 304. Section 304 is statutory, not a part of the Constitution. It may or may not turn out to be permanent legislation.

Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now may appropriate, and so authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, may be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, may be satisfied by any appropriation out of which the judgments may be by Act of Congress, payable.

The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe

it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continues to this day.

In the conclusion arrived at, it is immaterial whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, or any part thereof, is constitutional or not. We do not decide that question. The plaintiffs are entitled to recover in either event. As previously indicated, consideration of Section 304 is necessarily confined to narrow limits, as narrow as the claims themselves.

Plaintiff Robert Morss Lovett in case No. 46026 is entitled to recover $1,996.40; plaintiff Goodwin B. Watson in case No. 46027 is entitled to recover $101.78; and plaintiff William E. Dodd, Jr., in case No. 46028, is entitled to recover $59.83. Judgments will be entered accordingly. It is so ordered.

LITTLETON, Judge, concurs.

WHITAKER, Judge, concurring:

I desire to state very briefly the reason for my concurrence in the result reached by the court.

In the brief filed for the Congress it is argued that the power of that body to appropriate money is without limitation and, hence, that it can attach any condition it pleases on the use of the money appropriated. Even if we accept this statement without limitation, still, section 304 goes much beyond a mere restriction on the use of the money appropriated by that Act. It not only prohibits the use of the money thereby appropriated to pay plaintiffs' salaries, but it also prohibits the use of any money theretofore or thereafter to be appropriated to pay their salaries, either in their present positions or in any other governmental positions, except as jurors or members of the armed forces. This amounts to depriving plaintiffs of their rights as citizens to enjoy the emoluments of office. It is, therefore, an Act inflicting punishment upon them without a judicial trial.

The passage of such an Act is prohibited by clause 3 of section 9 of Article I of the Constitution, which reads: "No bill of attainder or ex post facto law shall be passed." A bill of attainder has been defined by the Supreme Court as "a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." Cummings v. Missouri, 4 Wallace 277, 323.

I have no doubt that section 304 of this appropriation Act violates this provision of the Constitution; no judicial tribunal has found them guilty of any crime, but by this Act they have been denied the salary attached to any office they may now or hereafter occupy. Patently, this violates this provision of the Constitution. If it does, it is void, although if was enacted in the exercise of the power of Congress to appropriate money. The grant of any power by the Constitution is subject to the limitation that it must not be exercised in a way that would nullify another provision of the Constitution. See, for instance, Marbury v. Madison, 1 Cranch, 137; Rhode Island v. Massachusetts, 12 Pet. 657; Knowlton v. Moore, 178 U. S. 41; Dick v. United States, 208 U. S. 340.

Since I am convinced that this Act does violate this provision of the Constitution, I find it unnecessary to consider the other constitutional objections to it, to wit, whether it amounted to a removal of these men from office or a denial of due process of law.

57 Courts never take pleasure in saying that a coordinate branch of the Government has exceeded its constitutional powers; certainly in this case I take no pleasure in saying that Congress has done that which it had no power to do; but since I am convinced that the restriction amounts to a bill of attainder I am under compulsion to say that the restriction is invalid and, hence, cannot operate to deprive these men of the salaries to which their positions entitle them.

JONES, Judge, concurring.

I concur in the result.

The single issue in this case is whether Section 304, as worded, is a valid exercise of the constitutional powers of the Congress.

The authority of the Congress to make appropriations, within the framework of the Constitution, is plenary. The power to make appropriations carries with it the power to withhold or deny appropriations. That power has been exercised for generations. This is as fundamental as the ten commandments.

As to the wisdom of granting or withholding appropriations, the courts have no right to pass judgment, granted, of course, that the Congress is acting within the scope of its authority.

The Congress has the sheer power to grant or withhold current appropriations to individuals except for services already rendered, regardless of whether the action taken is wise or unwise. It does not have to assign a reason for such action, and we have no right to ask for a reason.

A member's constituency alone, under our philosophy of government, has a right to call such member to account.

Having the power to appropriate for specified purposes it has the power to limit the use of such funds so long as it is merely a limitation.

If Section 304 merely forbade the use of funds in the bill, or other funds already available in other bills, I would have no hesitancy in holding it a limitation on appropriation.

The true issue is narrowed to whether the expression "or which is hereafter made available under or pursuant to any other act" transforms it from an appropriation to a legislative provision, and whether such legislation deprives plaintiffs of valuable rights as citizens which they would otherwise have under the Constitution.

The language quoted goes beyond a mere limitation on appropriation and becomes, unless affirmatively repealed, a permanent denial of plaintiffs' rights as citizens. A rose remains a rose even though someone calls it a lily.

No one has a right to be employed by the Government, but every citizen, whose rights have not been legally forfeited, is privileged to apply for any position within the Government and to have his application considered on its merits. This is a thing of value not only intrinsically, but because of the satisfaction it brings a man regardless of whether it is ever exercised. The knowledge of its possession is a powerful element in the pursuit of happiness. Section 304 forecloses this right and closes that door of opportunity.

The national government is one of delegated powers in all its branches. All powers not delegated remain with the states or with the people.

The tenth amendment is as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The ninth amendment is as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The power to provide or deny appropriations is vested in the Congress. There is no other way to take money out of the Treasury. The Constitution provides (Art. I, Sec. 9):

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *."

If Section 304 were a mere denial of appropriation, however unjust it might be, it could not be successfully questioned. But it does not stop with a mere denial of appropriation. It goes far beyond this. It forbids on a permanent basis employment in the future. It this becomes a permanent legislative bar,

I cannot find within the four corners of the Constitution any power lodged in the Congress to deny these privileges to
59 any citizen, except in the manner prescribed in the Constitution.

The principle of equality was written in the Declaration of Independence before we had a Constitution. It was the result of a long struggle of English peoples upward toward the plains of liberty. It is one of our proudest traditions. It was carried forward into the Constitution. It shines through almost every provision in that instrument. The Constitution provides for liberty, equality and fair play; and freedom from every form of new and old world caste and privilege, and from the tyranny of wealth and birth. It throws every safeguard around the rights and privileges of the individual citizen.

The right to seek employment is one of the most highly prized rights of the Anglo-Saxon race. When a citizen by his conduct forfeits any of his rights, privileges, and immunities, a method is provided for establishing that forfeiture. That method was not pursued here. One of the chief glories of the Constitution is the fact that you cannot take the shirt from the back of a ragged street urchin without either securing the lad's consent or paying for the rags in the manner prescribed by law. The same is true of his privileges in every form. Truax v. Raich, 239 U. S. 33, 41; Yick Wo v. Hopkins, 118 U. S. 356, 370; International News Service v. Associated Press, 248 U. S. 215, 236.

Section 304 in making a permanent ban on the rights and privileges of the plaintiffs, exceeds the authority delegated to the Congress by the Constitution.

MASON, *Judge*, concurring in the result.

I agree with the decision of the court, but, because of the importance and variety of the problems presented, I make the following additional observations.

Nothing is claimed to have been done or said or written by any of the plaintiffs which was unlawful. No statute or legal doctrine is brought forward under which it is claimed that they could have been restrained before utterance or action, or punished thereafter by so much as a penny fine. And no indirect adverse legal consequences were attached to what they said or did by any legal doc-
60 trine, or by statutes such as the Hatch Act, or the various provisions in other acts disqualifying for Government employment members of organizations which advocate the overthrow of our constitutional form of government. It is not claimed that they violated those laws. In short, what they did was completely innocent and of no interest or consequence to the law

of the land as it then was, or, as to all persons except the three plaintiffs, as the law still is. And this was true without any resort to constitutional protections of freedom of utterance or action. The law, wholly apart from the Constitution, did not touch what they had done. But as a consequence of their having done what they did, the three plaintiffs find themselves excommunicated, reduced to the status of three second-class citizens among all of the millions of their fellows. They find themselves subject to the same obligations as their fellow first class citizens to obey the laws, pay taxes, and serve in the armed forces and on juries; but completely and perpetually disqualified from serving their Government in any of the thousands of positions in which any of the rest of us, if technically capable, may serve. It is not claimed that the three plaintiffs were not competent to perform, or did not faithfully perform, the duties of the positions they held.

Has Congress the power to remove, by statute, named individuals from Government service, and make them perpetually ineligible to hold positions in Government service because they have engaged in conduct which was entirely lawful? Section 304 purports to do this. If it in fact accomplishes it, it has accomplished, under the guise of law, a shocking and outrageous injustice, unique in our history, and discouraging because it follows one hundred and fifty years of experience under the best Government men have devised. The court's problem is not, of course, whether Section 304 is unjust, but whether it is unconstitutional. But when the injustice of the particular law is so shocking, and the threat of its repetition and extension is so menacing to our institutions, as in the case of Section 304, one can hardly be blamed for saying to himself, even before he consults the text of the Constitution, "If the Constitution is the charter of liberty and free government which I have always supposed that it is, does not permit this."

61 If Section 304 is valid, Congress can disqualify for public office or service racial minorities, political minorities, and, probably, religious minorities. To do so would, indeed, be less unjust than what is done by Section 304. If a racial minority were excommunicated, the statute would at least have one quality of what we have been accustomed to regard as law, the quality of generality of application to all persons of an ascertainable class. No individual would have the finger of the state pointed at him, as these three plaintiffs have, saying "You are degraded, not because of the kind of person you are, for there may be thousands of persons just like you in all essential respects, who are still full citizens; not because of what you have done, for there may be thousands of persons who have done the same things, so far as those things are relevant to a rational state, as you have done.

You are degraded because the state has selected you for degradation." And a racial or other minority could under the constitutional protections which would apply even to second-class citizens, pool their resources and agitate for the repeal of the statute with some slight hope that in the turn of political events a powerful party might need the votes of this minority to insure its success, and hence would espouse its cause. But three individuals, such as these plaintiffs, are helpless. If they speak, who will listen? If they should happen to have the money to publish, who will read? Their appeal would appear to be completely selfish. The reaction would be: "Who are these persons, of the dominant race, of many generations of honorable American ancestry, to be complaining of discrimination? I don't know just what has happened to them, but if they can't take care of themselves, nobody can." And nobody can, if Section 304 is valid.

Section 304 is asserted by the plaintiffs to be unconstitutional because (1) it purports to remove the plaintiffs from executive offices, and no power of removal resides in the legislative branch of the Government, except by impeachment; (2) it is a bill of attainder, or its equivalent, a bill of pains and penalties, which the Constitution forbids; and (3) it deprives the plaintiffs
62 of liberty and property without due process of law, in violation of the Fifth Amendment.

I have no doubt that Section 304 is a bill of pains and penalties and is therefore unconstitutional. It has the ancient flavor of the bills of attainder which were so odious to the makers of our Constitution that they forbade such laws in the main body of the Constitution and before the bill of rights later embodied in the first ten amendments was thought necessary, in that it, like the bills of attainder that the fathers were familiar with, selects its victims as named individuals, and not as persons belonging to any describable class. It punishes them by removal from office and income and disqualification from ever again serving their Government for compensation except in military or jury service. It thus imposes the same penalty which the Senate is authorized to impose, on conviction by a two-thirds vote after impeachment by the House, upon officers guilty of "treason, bribery, or other high crimes and misdemeanors." The question of whether the forfeiture of the right to pursue a public calling was punishment, so that a statute imposing it for past innocent conduct is an ex post facto law and a bill of pains and penalties was settled right in the cases of Cummings, the priest, 4 Wall. 277, and Garland, the lawyer, 4 Wall. 333.

I think Section 304 violates the Fifth Amendment in that it attempts to deprive the plaintiffs of liberty and property without

due process of law. I recognize that the Fifth Amendment does not, like the Fourteenth, which applies only to state governmental action, expressly assure equal protection of federal laws. But a statute which selects persons for punitive action on a completely personal basis, with no attempt to treat similarly other persons similarly situated, is so foreign to our concepts of law that it is difficult to think of it as law at all, though it bears the stamp of legislative enactment. If a legislature refuses to define the conduct which it desires to punish, if done by A, in such terms that B and C and D and will be equally punishable if they do it, but instead merely provides that A shall be punished if he does it, the legislature engages, not in law making, but in arbitrary action.

And this would be true, even if the statute did not, as Sec-
63 tion 304 does, attempt to make punishable conduct which was wholly innocent when engaged in. There are indications in opinions of the courts, though the necessity for deciding the questions has not hitherto arisen, that the due process of law which is required by the Fifth Amendment would not be satisfied by the arbitrary selection by the legislature of certain named individuals to be the sole victims of penal laws. In Hurtado v. California, 110 U. S. 516, 535, where the arbitrary action of a state was in question, the court said:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, * * *".

The cases of Nichols v. Coolidge, 274 U. S. 531; Wallace v. Currin, C. C. A. 4, 95 F. (2d) 856; Minski v. United States, C. C. A. 6, 131 F. (2d) 614; United States v. Ballard, W. D. Ky., 12 F. Supp. 321, also indicate the same attitude toward governmental action in the guise of law which penalizes persons unequally. I think, therefore, that Section 304 is forbidden by the Fifth Amendment.

It is urged that Section 304, even if it would otherwise be invalid as a trespass by Congress upon the executive function of removal of executive officers, is saved by the provision that these plaintiffs might keep their positions if, within the period of a few months set by the statute, they were appointed by the President and confirmed by the Senate. But no other person in the country had to pursue such a course in order to obtain or hold those positions, or identical or comparable ones. The requirement was intended to be, and was, discriminatory and oppressive

as to three selected individuals out of all the people in the country. Under a system of equal justice under law, the three plaintiffs should not be subjected, in order to get or hold a Government position, to any other or different requirements than the rest of us are subject to. And the Constitution, I think, forbids their being so oppressed.

It is, in effect, urged that even though Section 304 is unconstitutional for any or all of the reasons suggested, there can be no relief for its victims because the Section is a part of an Appropriation Act, and the power of Congress to control *expenditures* is absolute. It may well be that under our Constitution, and under any constitution which might be devised for a free people, one branch of the Government could, temporarily at least, subvert the Government. The Judges might refuse to enforce legal rights or convict criminals. The President might order the Army and Navy to surrender to the enemy. Congress might refuse to raise or appropriate money to pay the President or the Justices of the Supreme Court and the other courts. But any of these imagined actions would not be taken pursuant to the Constitution, but would be acts of subversion and revolution, the exercise of mere physical power, not lawful authority. And conduct by any branch of the Government less ruinously subversive, but, so far as it goes, equally unconstitutional, is likewise an exercise of physical power rather than lawful authority. I do not think, therefore, that the power of the purse may be constitutionally exercised to produce an unconstitutional result such as a taking of a citizen's liberty or property without due process of law, a conviction and punishment of a citizen for wholly innocent conduct, or a trespass upon the constitutional functions of another branch of the Government. And to whatever extent it is within the jurisdiction of a court to which the question is presented in litigation, to give judgment according to the Constitution, even though that requires the court to disregard a statute which conflicts with the Constitution, the judges are bound by their oaths to give such a judgment. In this case, therefore, we must disregard Section 304. Without it, the plaintiffs are in the position of having performed services for the Government, under lawful appointments, for which the Government has refused to pay. Each of them is, therefore, entitled to a judgment.

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65 *Judgment of the court*

November 5, 1945

Upon the special findings of fact, which are made a part of the judgments herein, the court concludes, as a matter of law, that the plaintiffs are entitled to recover.

It is therefore ordered and adjudged that plaintiff Robert Morss Lovett (in case No. 46026) recover of and from the United States the sum of one thousand nine hundred ninety-six dollars and forty cents ($1,996.40); that plaintiff Goodwin B. Watson (in case No. 46027) recover of and from the United States the sum of one hundred one dollars and seventy-eight cents ($101.78); and that plaintiff William E. Dodd, Jr. (in case No. 46028) recover of and from the United States the sum of fifty-nine dollars and eighty-three cents ($59.83).

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 809, October Term, 1945

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Supreme Court of the United States

No. 810, October Term, 1945

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Supreme Court of the United States

No. 811, October Term, 1945

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.